No. 1206

In the Supreme Court of the United States

OCTOBER TERM, 1944

THOMAS PAPER STOCK COMPANY, ET AL.,
PETITIONERS

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 64–78) has not yet been reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered March 27, 1945 (R. 79). The petition for a writ of certiorari was filed April 26, 1945. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat.

Act to consider the objection that the provision was invalid during the period July 16 to September 11, 1943, on account of the Administrator's failure to publish his determination that there was no practicable alternative for securing effective price control. (R. 64–79.)

ARGUMENT

(1) The principal ground asserted for the granting of the writ is that the construction given by the court below to Section 203 (a) and Section 204 (a) deprived petitioners of due process of law by denying them the absolute right to administrative consideration of their protest and judicial review thereof on the merits by the Emergency Court of Appeals. This contention is, we submit, clearly without substance, particularly on the facts here presented and in the light of the decision of this Court in *Yakus* v. *United States*, 321 U. S. 414.

Petitioners have lost their absolute right to judicial review of the validity of the Regulation which they are charged with violating primarily because of their own failure to exercise the rights accorded them by the statute. From July 16, 1943, when the Taft Amendment was first adopted, until September 11, 1943, when the preamble to the Regulation was amended, petitioners were entitled, as of right, under the construction adopted by the court, to present in a protest the objection that the Regulation was invalid during

obtain leave in the enforcement proceedings against them to file a complaint in the Emergency Court of Appeals, challenging the validity of the Regulation during the particular period with which they are now concerned. Indeed, as Judge Lindley pointed out in his concurring opinion in the court below, one of the reasons for the adoption of Section 204 (e), indicated in the legislative history, was the desire of Congress to avoid the question, suggested by the opinion of this Court in the *Yakus* case, "whether one who is forced to trial and convicted of violation of a regulation, while diligently seeking determination of its validity by the statutory procedure, may thus be deprived of the defense that the regulation is invalid." (321 U. S. at p. 447.) Thus, by amendment of the Act, Congress removed the possibility that the exclusive jurisdiction provisions of the statute, coupled with the statutory time limit upon the filing of protests, might in another context, not passed upon by this Court in the *Yakus* case, raise a serious constitutional issue.

It is true that the statutory limit upon the filing of the protest involved here is not the sixty-day period involved in the *Yakus* case, but the more indefinite period measured by the continued effectiveness of the Regulation. It is also true that the alternative avenue to judicial review, by way of Section 204 (e) (1), is conditioned upon a finding by the district court that the ob-

jections to the validity of the Regulation are urged in good faith and that there is reasonable excuse for the failure to present them in a protest filed before the institution of the enforcement proceedings. But it must be assumed, for the purposes of this discussion, that in the application of Section 204 (e) (1) to situations such as here presented, the length of time that the protest procedure was available will receive appropriate consideration by the enforcement court in determining whether there was reasonable excuse for the defendant's failure to make use of that procedure; and that the discretion of the court to grant or deny leave to file a complaint will, and indeed must, be exercised so as to preserve, at the minimum, the essentials of due process.[3] What this Court said of the protest procedure in the *Yakus* case is equally applicable here to the statutory alternative to the protest procedure embodied in the special complaint procedure of Section 204 (e) (1): "Only if we could say in advance of resort to the statutory procedure that it is incapable of affording due process to petition-

[3] The authority of the district court to grant or deny leave to file a complaint is, of course, not entirely discretionary. Section 204 (e) provides that the court in which enforcement proceedings are pending "*shall* grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a)." (Emphasis supplied.)

ers could we conclude that they have shown any legal excuse for their failure to resort to it or that their constitutional rights have been or will be infringed." (321 U. S. at p. 435.)

We submit, therefore, that petitioners have failed to present a substantial constitutional question which is properly raised on the record now before the Court.

(2) Apart from the alleged constitutional obstacle discussed above, petitioners suggest no reason why the interpretation adopted by the court below is not entirely consistent with the language of Section 203 (a) and the pattern of the statute as a whole. As the court below suggested, any other construction of the statute would lead to the result that a protest could be filed by anyone who had once been subject to a regulation, no longer in effect, at least so long as the protestant might still be subject to penalties for its prior violation. The fact that Section 203 (a) now provides that "At any time after the issuance of any regulation or order * * * any person subject to any provision of such regulation, [or] order * * * may * * * file a protest specifically setting forth objections to any such provision" does not itself support the proposition that such a protest may be filed after the regulation is no longer in effect, or after it has been modified so as to obviate the objection. Being subject to penalties for violation of a superseded

regulation does not mean that one is still subject to the regulation within the meaning of Section 203 (a);[4] the penalties depend not on the continued effect of the regulation, but on the operation of the statute itself. *United States* v. *Hark and Yaffee,* 320 U. S. 531. Furthermore, as the court below said: "The Act * * * does not contemplate that he [the Administrator] may be wholly diverted from his all important administrative task of price control for the sole purpose of performing the unrelated judicial task of determining the effect of past regulations upon the rights and liabilities of private individuals." (R. 69.) Where the sole interest that a protestant can possibly serve by the filing of his protest is protection against imposition of the sanctions of the Act, it seems far more appropriate that he be remitted to proceedings under Section 204 (e) (1), which are more closely geared to the enforcement proceedings themselves.[5]

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[4] Cf. *The Buka Coal Company* v. *Brown,* 133 F. (2d) 949 (E. C. A.), where the Emergency Court of Appeals upheld the Administrator's construction of the phrase "subject to" as used in Section 203 (a) of the Act. This definition, presently appearing in Section 24 of Revised Procedural Regulation No. 1 (9 F. R. 5791), headed "Right to protest" reads "A person is, for the purposes of this revised procedural regulation, subject to a provision of a maximum price regulation only if such provision prohibits or requires action by him, * * *."

[5] Under the provisions of Section 204 (e) (2), a protest filed subsequent to institution of any enforcement proceedings might well be futile in many cases. This section pro-

It remains only to consider the suggestion put forth in Judge Laws' dissenting opinion, and faintly echoed by petitioners, that this construction of the Act should be rejected because save for the addition of Section 204 (e) the Act so construed would have presented a serious constitutional question of due process. This argument ignores the fact that before the amendment embodied in the penultimate sentence of Section 204 (e) (2) a declaration of invalidity would have been ineffective to provide immunity from the consequences of previous violations; thus a protest filed against a regulation no longer in effect could have served no useful purpose, and no constitutional doubt would have been avoided. If there was ever any question that this construction reflected the Congressional intention underlying the original statute, it was resolved by the legislative history of the 1944 amendments and particularly by the evolution of Section 204 (e) itself.[6] Whether or not this effect of the Act in

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hibits stays of enforcement actions during the pendency of protests filed subsequent to the institution of enforcement actions. Thus often the enforcement action will have been completely terminated before any effective decision could be rendered through the statutory protest and review procedure, as distinguished from the direct complaint procedure authorized by Section 204 (e) pursuant to leave of court.

[6] The Senate Committee on Banking and Currency in discussing Section 107 of S. 1764 (S. Rep. No. 922 on S. 1764, 78th Cong., 2d Sess., p. 13) stated:

its original form would have presented a constitutional issue not foreclosed by the decision of this Court in the *Yakus* case is, of course, now an academic question which can hardly serve as a reason for the granting of the writ. Nor can it now provide a basis for straining the language of Section 203 (a) out of its normal meaning, or for thrusting upon the Administrator a burden which comports so ill with the statute in its present form.

"* * * It also seems clear that if compliance is to be effectively secured while a case involving the validity of a regulation is pending, civil remedies, including the treble-damage provision, should not be nullified by a subsequent determination of invalidity of the regulation. It is, therefore, made explicit in the amendment that the pendency of a protest or a complaint is not to be grounds for delaying a civil proceeding, and also that a judgment of invalidity in the Emergency Court of Appeals is not to be grounds for relief from civil liabilities which have been incurred on account of violations before such determination of invalidity. If civil remedies were not thus left unimpaired by the amendment, it would undermine the fundamental proposition that price and rent regulations must be obeyed even while being litigated, thus jeopardizing one of the principal benefits of the exclusive jurisdiction provisions of the statute."

The Stabilization Extension Act as finally passed extended the retroactive applicability of a determination by the Emergency Court of Appeals to civil, as well as criminal, actions under Section 205 of the Act. Even under the Act as passed, however, Emergency Court of Appeals' determinations of invalidity have no retroactive effect in any respect other than in their applicability to enforcement actions brought under Section 205 of the Act. See footnote 14 to the opinion of the court below (R. 71).

CONCLUSION

The decision below is correct, and does not warrant further review. The petition should be denied.

Respectfully submitted.

HUGH B. COX,
Acting Solicitor General.

RICHARD H. FIELD,
General Counsel,
Office of Price Administration.

MAY 1945.

APPENDIX

Pertinent provisions of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, as amended by the Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess., are as follows:

SEC. 2 (j) Nothing in this Act shall be construed (1) as authorizing the elimination or any restriction of the use of trade and brand names; (2) as authorizing the Administrator to require the grade labeling of any commodity; (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity; or (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government agency.[7]

* * * * * *

SEC. 203 (a) *At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof*

[7] Entire subsection (j) added by sec. 5 (a), Public Law 151, 78th Cong., 1st Sess. (July 16, 1943), 57 Stat. 566.

specified in section 206,[8] any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections.[9] Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing,[10] the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to pre-

[8] As amended by sec. 106 of Stabilization Extension Act of 1944. The section formerly read, in place of italicized language: "Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206."

[9] As amended by sec. 106 of Stabilization Extension Act of 1944. At this point the following language was stricken out: "At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days."

[10] As amended by sec. 106 of Stabilization Extension Act of 1944. At this point the following language was stricken out: "or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later."

sent further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

* * * * *

SEC. 204 (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided,* That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such

objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

* * * * *

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days

after judgment in any civil or criminal proceeding, brought pursuant to section 205 involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provisions;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205, setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals

which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205; nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206."

[11] Entire subsection (e) added by sec. 107 (b) of Stabilization Extension Act of 1944.

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